

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PAUL S. YOUNG

Claimant

VS.

**MID AMERICA PIPE FABRICATING &
SUPPLY, LLC.**

Respondent

AND

CINCINNATI INSURANCE CO.

Insurance Carrier

Docket No. **1,042,344**

ORDER

Respondent and its insurance carrier (respondent) request review of the June 25, 2013, Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on October 15, 2013.

APPEARANCES

William Phalen of Pittsburg, Kansas, appeared for claimant. Ryan Weltz and Jon Hines of Overland Park, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board has considered the entire record and adopts the stipulations listed in the Award.

ISSUES

The ALJ found claimant sustained a 24% functional impairment, consisting of 20% to the body for claimant's physical injury and 5% to the body for his psychological injury. The ALJ also found claimant was permanently and totally disabled.

Respondent requests review of the nature and extent of claimant's disability and whether claimant is entitled to future and unauthorized medical compensation. Respondent argues claimant is not permanently totally disabled due to his work-related injury and that claimant is entitled to an award based on the functional impairment resulting from his physical injury only.

Claimant argues the ALJ's Award should be affirmed. If the Board determines claimant is not permanently totally disabled, claimant seeks to have the claim remanded to the ALJ.

The issues on review are:

1. Did claimant sustain psychological injury as a result of his work-related accident?
2. What is the nature and extent of claimant's disability?
 - a) What is claimant's functional impairment?
 - b) Is claimant entitled to an award of work disability?
 - c) Is claimant entitled to an award based on permanent total disability?
3. Is claimant entitled to unauthorized and future medical?

FINDINGS OF FACT

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings:

Claimant was age 52 at the time of his July 21, 2008, accident. He graduated from high school in 1974 and attended a half semester at Independence Community College. In 1975, he took a 6-month welding class at Kaw Area Vocational Technical School. In 1996, claimant received a certificate of instruction from the Wichita Area Vocational Technical College. The latter certificate allowed him to instruct a welding class at a private school. Claimant also has some on-the-job training for forklift and bush hog operation.

Respondent manufactures steel pipe fittings for water and sewage treatment plants. Claimant was employed by respondent for approximately five years as a plate roller which required him to roll flat steel to prepare it for welding. The steel plates weighed over 100 pounds and claimant lifted, pushed and pulled the plates daily.

Claimant described his July 21, 2008 accident, the compensability of which is stipulated, as follows:

I was pulling and dragging some steel cables that weigh over a hundred pounds, was lifting them up onto a truck to unload a piece of pipe, lifting and twisting, and had a pop in my back, immediate pain down my right leg.¹

Claimant initially sought treatment from a chiropractor, Dr. Tim Voss, on approximately four occasions. Respondent referred claimant to Dr. F. Ronald Seglie in Pittsburg, Kansas. Dr. Seglie ordered lumbar and thoracic MRI scans and referred claimant to a surgeon, Dr. Brian Curtis, in Joplin, Missouri. Dr. Curtis first treated claimant's radiculopathy with an epidural steroid injection.

Respondent tried to accommodate claimant's restrictions with a sedentary job from August 7, 2008, through September 25, 2008, which was the last day claimant worked.

On June 8, 2009, Dr. Curtis performed surgery consisting of an anterior and posterior fusion from L3 to L5. On February 21, 2012, Dr. Curtis found claimant had reached maximum medical improvement.

Dr. Edward Prostic, a board certified orthopedic surgeon, evaluated claimant on October 27, 2008, at the request of claimant's counsel. The doctor reviewed claimant's medical records, took a history and performed a physical examination. Dr. Prostic found claimant aggravated preexisting degenerative disc disease and spinal stenosis when he sustained the work-related accident. Dr. Prostic opined claimant was capable of engaging in predominantly sedentary or light employment.

On March 26, 2010, claimant was again evaluated by Dr. Prostic. The doctor reviewed updated medical records, took additional history and performed another physical examination. Dr. Prostic found claimant could return to light-duty employment and should avoid frequent bending and twisting at the waist; forceful pushing or pulling; and captive positioning. Dr. Prostic also restricted more than minimal use of vibrating equipment.

Based on the *AMA Guides*,² Dr. Prostic found claimant sustained a 22% functional impairment to the body as a whole.

Dr. Jeffrey MacMillan, a board certified orthopedic surgeon, evaluated claimant on June 16, 2010, at the request of respondent's attorney. The doctor reviewed claimant's medical records, took a history and performed a physical examination. Dr. MacMillan diagnosed a solid two-level lumbar fusion and found claimant had achieved maximum medical improvement. Dr. MacMillan opined claimant would not need any future medical treatment related to his work accident.

¹ R.H. by Depo. (Sep. 10, 2012) at 10.

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Based on the *AMA Guides*, Dr. MacMillan found claimant sustained a 20% whole body functional impairment and was capable of functioning at a medium physical demand level. Dr. MacMillan reviewed the list of claimant's former work tasks prepared by vocational consultant Steve Benjamin and concluded claimant could no longer perform 24 of the 44 tasks for a 54.5% task loss. The doctor opined claimant is physically capable of performing work in the open labor market.

Karen Terrill, a vocational rehabilitation counselor, conducted a telephone interview with claimant on August 4, 2010, at the request of claimant's counsel. She prepared a report containing a list of 38 unduplicated work tasks claimant performed in the 15-year period preceding his injury. At the time of the interview, claimant was not working. Ms. Terrill prepared a supplemental report on May 25, 2012, in which she opined claimant is realistically unemployable in the open labor market.

Mr. Benjamin conducted a telephone interview with claimant on August 31, 2010, at the request of respondent's attorney. He prepared a report setting forth 44 unduplicated work tasks claimant performed in the 15-year period before his injury. Mr. Benjamin opined claimant is capable of earning \$359.20 per week.

On September 21, 2010, a CT scan of claimant's lumbar spine was conducted that revealed evidence of central spinal stenosis at L2-3 and L3-4. Dr. Prostic testified claimant's arthodesis from L3-5 would probably accelerate degeneration at the superior levels of claimant's lumbar spine and that surgical decompression may be required.

Claimant was again seen by Dr. Prostic on August 12, 2011. The doctor diagnosed continued mechanical low back pain and meralgia paresthetica. Dr. Prostic restricted claimant from frequent bending or twisting at the waist, forceful pushing or pulling, more than minimal use of vibrating equipment, and captive positioning. The doctor's functional impairment rating remained the same.

On April 17, 2012, claimant was evaluated by Dr. Prostic for the fourth time. The doctor testified that claimant was permanently and totally disabled from engaging in substantial and gainful employment due to his work-related injury on July 21, 2008.

Dr. Prostic testified:

At this time, he is able to return to only light duty employment on a strictly orthopedic basis. When emotional factors are included, he is likely unable to return

to any gainful employment.³ Orthopedic permanent partial impairment is rated at 20% of the body as a whole on a functional basis.⁴

Dr. Prostic reviewed the task list prepared by Karen Terrill and concluded claimant could no longer perform 25 of the 38 tasks for a 66% task loss.

Dr. James Jackson, a licensed psychologist, evaluated claimant on November 3, 2012, at the request of claimant's counsel. The doctor reviewed claimant's medical records, interviewed claimant and performed a mental status examination. Dr. Jackson diagnosed claimant with an undifferentiated somatoform disorder:

Q. And for the benefit of the Administrative Law Judge could you, in layman's terms, describe for him what that diagnosis means?

A. Yes. Succinctly, what that means is that when an individual experiences conflict, anxiety, undesirable emotion, they tend to repress that awareness which results in somatic symptoms, physical symptoms, increased pain, soreness of muscles, headaches.⁵

Dr. Jackson testified claimant's psychological condition was directly caused by claimant's accidental injury of July 21, 2008. Based upon the *AMA Guides*, Dr. Jackson found claimant sustained a 5% psychological impairment. The doctor further found that claimant is permanently disabled from performing any substantial gainful employment.

Dr. Jackson testified that claimant did not have chronic anxiety or depression. The doctor testified:

Q. So what makes Mr. Young unique above and beyond the population of people with residual complaints of a physical nature following this type of surgical procedure?

A. I think his self-presentation in the interview, the objective data from several of the psychological instruments that were applied clearly indicated it was clinically significant from a psychological perspective. I wouldn't expect the group of people you're talking about to necessarily be showing up with the clinical picture that Mr.

³ In expressing this opinion, Dr. Prostic relied in part on the results of an MMPI conducted at the doctor's request. According to Dr. Prostic, the MMPI revealed claimant has emotional barriers to his recovery. Dr. Prostic was not qualified as an expert witness in any field of mental health.

⁴ Prostic Depo. (Oct. 24, 2012), Ex. 5 at 2.

⁵ Jackson Depo. at 13.

Young displayed on the tests, although they may be saying some of the same things.⁶

Respondent presented no evidence from a psychiatric or psychological expert.

Claimant testified he continues to have constant low back pain that radiates down his right leg to the foot. He has tingling in the right foot, constant numbness in his left thigh with occasional pain down the left leg to the knee. Claimant testified he is not able to stand or sit for prolonged periods of time and he lays down three or four times a day in an effort to relieve his pain.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) finds burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁷

In *Love v. McDonald's Restaurant*,⁸ the Kansas Court of Appeals stated:

In order to establish a compensable claim for traumatic neurosis under the Kansas Workers' Compensation Act, K.S.A. 44-501 *et seq.*, the claimant must establish: (a) a work-related physical injury; (b) symptoms of the traumatic neurosis; and (c) that the neurosis is directly traceable to the physical injury.

Permanent total disability exists when an employee, on account of his or her work-related injury, has been rendered completely and permanently incapable of engaging in

⁶ *Id.* at 34-35.

⁷ K.S.A. 2008 Supp. 44-501(a).

⁸ *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, 771 P.2d 557, *rev. denied* 245 Kan. 784 (1989).

any type of substantial, gainful employment.⁹ An injured worker is permanently and totally disabled when rendered “essentially and realistically unemployable.”¹⁰

The Board finds claimant sustained his burden to prove his compensable accident resulted in physical and psychological injuries; that as a consequence of his accidental injuries, claimant sustained a 24% permanent impairment of function to the whole body; that claimant is permanently and totally disabled; and that the ALJ did not err in awarding claimant future treatment and unauthorized medical.

There is no dispute claimant sustained personal injury by accident arising out of and in the course of his employment on July 21, 2008. There is a dispute whether claimant sustained psychological injury directly traceable to the physical injury. The only expert in the field of psychology or psychiatry to provide evidence in this claim was Dr. Jackson, who opined claimant’s psychological disorder was directly caused by the July 21, 2008 accidental injury. The only opinion in the record regarding claimant’s psychological impairment is that of Dr. Jackson, who testified claimant sustained a 5% permanent impairment of function to the whole person under the *AMA Guides*.

The Board is mindful of respondent’s arguments concerning the lack of psychological treatment and the length of time between the accident and Dr. Jackson’s diagnosis of undifferentiated somatoform disorder. However, the points emphasized by respondent do not render Dr. Jackson’s opinions so improbable or unreasonable as to justify their total rejection, especially considering the lack of expert testimony refuting Dr. Jackson’s opinions.

The preponderance of the credible evidence supports the ALJ’s finding of a 24% permanent impairment of function to the whole body, consisting of 20% to the body for claimant’s back injury, based on the rating of respondent’s medical expert, Dr. MacMillan, and the 5% rating of Dr. Jackson for claimant’s psychological injury.

There is evidence in the record that supports the finding that claimant is permanently totally disabled, and there is evidence that is inconsistent with such a finding. However, the Board finds that the preponderance of the credible evidence establishes that claimant is essentially and realistically unemployable, as found by the ALJ. Karen Terrill, the vocational expert, expressed her opinion that claimant is realistically unemployable in the open labor market. Dr. Prostic testified claimant is permanently totally disabled from engaging in substantial gainful employment due to the work-related injury. Dr. Jackson testified claimant is permanently disabled from engaging in any substantial gainful employment.

⁹ K.S.A. 2008 Supp. 44-510c(a)(2).

¹⁰ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

Although Dr. MacMillan testified claimant is physically capable of performing work in the open labor market, the Board notes Dr. MacMillan found claimant was impaired to the extent of 20% of his body's functional capacity and is unable to perform over 50% of his pre-injury work tasks. In addition to the conclusions of Dr. MacMillan, the Board has also carefully considered the opinion of vocational consultant Steve Benjamin that claimant is capable of earning \$359.20 in the open labor market. However, the opinions of Dr. MacMillan and Mr. Benjamin are outweighed by the preponderance of the evidence, consisting of claimant's age; his work experience; his education and training; the severity of his injuries; his residual functional capacity; and the expert medical and vocational opinions of Dr. Prostic, Dr. Jackson, and Karen Terrill.

The issues of claimant's entitlement to future medical treatment and unauthorized medical require no discussion. Claimant is entitled to future and unauthorized medical as set forth in the ALJ's Award.

CONCLUSIONS OF LAW

1. Claimant sustained permanent psychological injury directly traceable to his July 21, 2008 accidental injury.

2. The nature and extent of claimant's disability is as follows:

a) claimant's permanent impairment of function is 24% to the whole body, consisting of 20% to the body for claimant's back injury and 5% to the whole body for claimant's psychological injury;

b) claimant is not entitled to an award of work disability because of the following finding regarding permanent total disability; and,

c) claimant is entitled to an award based on a finding he has been rendered permanently totally incapable of performing any type of substantial and gainful employment.

3. Claimant is entitled to future medical treatment and unauthorized medical as set forth in the ALJ's Award.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹¹ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

¹¹ K.S.A. 2008 Supp. 44-555c(k).

AWARD

WHEREFORE, it is the Board's decision that the Award of ALJ Brad E. Avery dated June 25, 2013, is hereby affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of January, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William Phalen, Attorney for Claimant
wlp@wlphalen.com

Ryan Weltz, Attorney for Respondent
rweltz@wsabe.com

Honorable Brad E. Avery, ALJ